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In The

Supreme Court of the United States

October Term 1999

ALBERT MCNAB, BARRY CHAPMAN, MICHAEL ASHER, WILFORD BOYLAND, LUTHER FOWLER, LINDA GOERS, JAMES HARRIS, FREDERICK HALES, GARY MARSHALL, CARL SCHMID, NICHOLAS SCHMUTTE, JAMES VOJIR, PAUL NORDMEYER,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

March 21, 1999

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QUESTIONS PRESENTED
ERISA 29 U.S.C. 1132(a)

1/ When the administrator has the discretion to select articipants in an early retirement plan pursuant to a best, business nterest criteria may multiple, delegated administrators who are lso fiduciaries systemically misrepresent or fail to disclose their ctual selection criteria which is based on personal patronage or cronyism."

2/ When the administrator has the discretion to select articipants in an early retirement plan pursuant to a best, business nterest criteria may multiple, delegated administrators ystemically ignore the best, business interest criteria and select or any reason such as the personal patronage or "cronyism" of he individual administrators.

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Section 1132(a).....1

LIST OF PARTIES

All parties are listed in the caption.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as McNab, et al.v.General Motors Corporation, -F.3rd-,WL 857853 (7th Cir. 1998). It is reprinted in the Appendix at p. 1 et seq. The opinion of the district court is reported at 987 F. Supp. 1115(S.D. Ind.1997) and it is reprinted in the Appendix at p.7 et seq.

JURISDICTION

The court of appeals entered its judgment on December 11, 1998. The Petitioners did not file a petition for rehearing. This Court has jurisdiction over this matter pursuant to 28 U.S.C. sec 1254(1). An extension of time was granted by Justice John Paul Stevens to March 21, 1999.

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974(ERISA) 29 U.S.C. 1001 et seq. The Petitioners based their individual claims on 29 U.S.C.1132(a). Their claim involves a denial of benefits and a breach of fiduciary duty.

STATEMENT OF THE CASE

A. Prior Proceedings:

- Petitioners, former employees of Allison Gas Turbine

Division, brought individual actions in the district court against their former employer, General Motors Corporation, for denial of early retirement benefits and for breach of fiduciary duty in the denial of these benefits. General Motors moved for summary judgment which was granted as to all Petitioners.

Petitioners appealed to the Court of Appeals for the Seventh Circuit and asserted two issues:

I. Whether GM's denial of the Window VI early retirement pension benefit was arbitrary and capricious.

II. Whether GM's denial of the Window VI early retirement pension benefit was a breach of its fiduciary duty. Appellants' Brief p.vi.

The court of appeals affirmed the summary judgments. The opinion ignored without comment on or citation to, Petitioners' arguments based upon Varity v. Howe, 516 U.S. 489 (1996). GM failed to disclose the hidden selection criteria and misrepresented to the Petitioners that nothing could be done to reverse the denials of the early retirement benefits. At Allison reversals of Window denials was systemic and based on personal patronage and "cronyism." Appellants' Brief pp.11, 15-32. The salutary, intent of fiduciary duty is turned on its head by the opinion below which sanctions systemic misrepresentation and whimsical selection under the guise of unfettered business judgment.

B. Statement of Facts:(Appellants' Brief p.2-30)

The essential facts are

1/ GM sold Allison Gas Turbine Division, including the employees, i.e. Allison employees were by GM policy prohibited from transferring to other GM divisions. According to

Allison's director of personnel once GM put Allison..."on the block...in order to deliver...the human assets to the potential buyer"...the inter-divisional transfer policy was suspended by GM.Appellants'Appd. vol.II p. 264.

In 1992 during the pendency of the Allison sale, GM was using, corporate-wide, an early retirement plan to reduce its salaried workforce.

2/ The previous Window selections at Allison were not protested by those selected or not selected for early retirement. Those selected for previous Window retirements at Allison were deemed by their managers to be of average (or less) value and those not selected remained GM employees with attendant salary and benefit accumulation.

3/ At Allison there was a panic to Window retire as a GM employee, because of the impending sale. As Henry Williams, executive director of Salaried personnel noted..." that was a time when you were going through a divorce that you didn't want."Appellants'Appdx.vol.I,p.156,157

4/ The Window provided an enhanced pension stipend with unlimited outside earnings and imbedded in the Window was retiree health insurance for those employees who did not have 30 years of credited service(five of the petitioners did not have sufficient credited service to obtain retiree health insurance upon reaching regular GM retirement age).

5/ The actual Window selection process at Allison was delegated to staff level(and below) managers who became plan administrators and fiduciaries with delegated discretion from GM corporate to select those at Allison for the early retirement benefit("Window"). None of the Allison selection decisions were

overruled by GM's corporate Management Committee charged with corporate governance over the Window.

6/ The petitioners were told that they were too valuable either to existing GM/Allison or to the future purchaser and there was nothing further they could do to reverse the non-selection decision.

7/ Allison selection decisions, including reversal of initial denials, were based upon personal patronage and friendship and not GM business rationale. Decisions on selections at Allison ran the gamut from absolute fairness(anyone can go who wants too) to a categorical denial that a Window even existed(although five of the petitioners were on this executive's financial staff and were told that he made the denial decisions) and all manner of inconsistent selections between these two extremes e.g. self-nomination, threats of bogus litigation, complaints of discrimination, friendship, badgering and assorted health problems of the employee or the employee's spouse.

8/ Initial non-selection decisions, based on the stated business rationale, were systemically reversed for reasons equally applicable to the Petitioners but these reasons were never disclosed to Petitioners

9/ While the initial GM corporate forecast(pre-sale announcement) projected only 35 Window retirees at Allison out of 522 employees who were age and seniority eligible for the Window (Appellants Appd.vol.III,p.114), 392 were selected by Allison and approved by GM's Management Committee for the Window and over 300 actually Window retired in 1992.

10/ The tale of the two Luthers illustrates the wisdom

of Varity and why it should not be ignored. Luther Fowler is a petitioner. He is no longer a GM employee by virtue of being "sold" as part of the "human assets" of Allison. He did not have 30 years of credited service. He was not eligible for GM retiree health insurance. His wife's serious illness rendered her uninsurable. He requested the Window in order to have retiree health insurance. He was denied and told there was nothing further he could do to reverse the decision. He was told by Allison's director of personnel that if he sought employment at other GM divisions contrary to the no-transfer rule, he would have his pay raises and other benefits withheld. Appellants' Brief p.17. Luther Hays, initially denied the Window, complained to Allison's director of personnel that his wife was ill and that he did not have sufficient credited service to obtain retiree health insurance. Luther Hays' initial denial of the Window was reversed.

C. Summary of Arguments in the Court of Appeals

1/Arbitrary Denial of Benefits:

Because of the sale panic the selection process was inconsistent and idiosyncratic. It was not based on any legitimate business rationale or the stated GM business purpose of Window VI. GM delegated to Allison, which in turn delegated to all levels of supervision, the authority to select Window VI retirees. A selection policy with discretion to determine what is in the best interests of GM does not permit selection decisions based on non-business reasons such as "cronyism."

When GM delegated plan administration to the lowest common denominator of management and, while acting as plan administrators and plan fiduciaries, conducted individualized selection for reasons contrary to the stated business purpose, then

GM must accept the risks of adverse verdicts based upon an abuse of discretion by a fiduciary.

The Window selection of "valuable executive employees" at Allison was in conflict with the policies at GM to select those who would not be of future value. Selected executives who were part of the management buyout of Allison were immediately returned to the same duties and salary at Allison GM under an individual contract. This ERISA benefit was denied the Petitioners for the same asserted valuation reason that applied to those executive beneficiaries who were selected. Petitioner Nicholas Schmutte, a contracts administrator attorney who did not have 30 years of credited service, asked for a reversal for the same reason as the selected executives. i.e. the Window and return as a contract employee but was denied(but see Appdx.p.3)

Nothing would have prevented discrete treatment of these executives outside the ERISA context, for example a "staying" bonus. Such a payment would not have implicated ERISA. Such a non-ERISA benefit would not have provided those executive beneficiaries with GM retiree health insurance while denying GM retiree health insurance to those Petitioners who were similarly situated.

Disparate treatment in the administration of benefits can be evidence of arbitrary and capricious decision-making. see Johnson v. Enron Corp., 906 F.2d 1234,1239-40 (8th Cir,1990); Glover v. South Central Bell Tel.Co., 644 F.2d 1155,1158(3rd Cir.1981)

Even when the benefit is conditioned upon the discretion of the Plan Administrator or in this case the multiplicity of supervisors/managers with discretionary authority, denial of the benefit can be arbitrary and capricious where fiduciary discretion

is abused. See Henglein v. Informal Plan For Plant Shutdown, 974 F.2d 391,401 (3rd Cir.1992)

2. Breach of Fiduciary Duty

GM misrepresented as a fiduciary that nothing could be done to reverse initial denials...because much could be done and was done to reverse the denial of a Window request e.g. complain often, threaten litigation, assert bad health, assert spouse's bad health or assert discrimination or unfairness. These reversals were not isolated instances of mere mistake but systemic occurrences of "cronyism". Appellants' Brief pp. 24-34

As fiduciary, administrator, employer, owner, and seller GM was in an inherent conflict of interest with regard to the sale of Allison and the selection of Allison Window retirees.

Neither Varity Corp. v. Howe, 516 U.S.489 (1995) nor Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) even suggests that a plan can by whimsical discretion delegate discretionary misrepresentation.

Since the petitioners are no longer employees of GM or members of the benefit plan in question, they must rely upon Varity and equitable relief to obtain benefits under the plan or they have no remedy.

REASONS FOR GRANTING CERTIORARI

1/The Court of Appeals Has Turned Firestone on Its Head by Establishing That Discretionary Selection Means That Selection for Any Reason Is Acceptable. Discretion to Select Becomes Absolute and Unfettered.

The opinion below sanctions the denial of benefits such as retiree health insurance for non-business reasons such as whimsy or personal patronage. The Petitioners never disputed bona fide business decisions. They consistently argued that because bona fide business decisions were not made, systemically, at Allison that their denial of benefits was arbitrary and capricious. Petitioners asserted and established that GM stated reasons were not the real reasons for the denial of the Window for Petitioners. The flexibility of "business judgment or discretion" as contemplated by ERISA is best exemplified by managerial judgment as to who or whom is or are the better accountant(s) or engineer(s); a subjective judgment about individual business qualities of the employee. This kind of judgment was not challenged by the Petitioners.

The opinion parcels the Petitioners' claims with a cudgel. The opinion infers great market forces are in play from business discretion but such inferences are mere speculation about what happened at Allison.(see Appdx.p.5,6) The opinion is against the foundation cases on summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317,322,23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242,249-50 (1986)

It is respectfully suggested that the reluctance to find probative discriminatory conduct where "business judgment" is the comparative environment is the resultant of the tension between the Congressional intent to regulate the individual employer/employee relationship by labor statutes(ERISA, ADEA, Title VII, ADA, FMLA) and the judicially created employment doctrine of "terminable at will."

Contrary to the court of appeals' assertion of "inverse

rankings of performance"(Appdx.6,infra) Petitioners consistently asserted that performance had nothing to do with the actual selection process at Allison because the selections were based upon "cronyism." Nearly everyone wanted out and nearly everyone eligible got out with a Window or at least were selected for the Window(392 out of 522).

While the opinion below summarized the Petitioners' argument in the following manner..."Plaintiffs' reply brief sums up their position: managers deviated from the..Plan's stated purpose and made selection decisions based upon cronyism, whimsy, and personal notions of honor, duty and fairness. They also reversed non-selection decisions...for hidden and undisclosed reason e.g. threats of litigation, complaints of discrimination, cronyism, complaints of health problems," the opinion ignored Varity.

The decision below renders Firestone and Varity a nullity in those situations where benefit selection depends on the exercise of discretion and discretion is exercised in a whimsical manner and misrepresentations, systemically, occur as to the motivations and reasons for selection. To adopt the "two wrongs don't make a right" standard for review of inconsistent evidence suggested by the district court and the court of appeals renders discretion absolute. ERISA is effectively repealed by plan discretion.

2/ The Court of Appeals Ignored Varity.

It is an unwavering duty of complete loyalty to the beneficiary that ERISA requires. NLRB v. Amax Coal Co., 453 U.S. 329 (1981). The fiduciary in Varity exercised business judgment and discretion when it sought to save money by cutting loose its "losers." While the Petitioners, were not as numerous as

those in Varity....Varity does not require or suggest a numerosity requirement.

The court of appeals' decision seems to suggest that when the plan gives the administrator/fiduciary the discretion to select beneficiaries from an age/seniority eligibility pool, the administrator/fiduciary has unfettered discretion to select for silly, frivolous, whimsical, discriminatory, reasons and may misrepresent and conceal these reasons to those eligible who are similarly situated to those selected.

By ignoring Varity the court of appeals puts individual mendacity claims for breach of fiduciary duty into the discretionary "trick bag" and out comes the discretionary axiom....different managers select for different reasons. Why must beneficiaries suffer the "cronyism" of personal patronage under ERISA? More importantly, why should the Petitioners or those similarly situated in the future suffer the loss of health benefits because they are told nothing can be done and yet others obtain the benefit by their patron or availing themselves of the hidden or secret selection criteria?

It is respectfully suggested that the proof standards under the discrimination statutes provide support for Petitioners' argument. see Purkett v. Elem, 514 U.S. 765, 768(1995). "At that stage implausible or fantastic justifications may(and probably will) be found to be pretexts for purposeful discrimination." The whimsical misrepresentative selections demonstrate at the proof stage of an abuse of discretion/breach of duty claim the failure of fiduciary GM to look to the interests of the Petitioners, and Hishon v. King & Spalding, 467 U.S.69, 75(1984)(..."a benefit that is part of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free...not to provide the benefit at all."). When an ERISA benefit

is doled out by personal patronage, concealed and misrepresented, then by analogy to Thurston and Hishon and Purkett, Varity must stand for the principle that a fiduciary who possesses broad discretionary powers may not abuse his discretion by misrepresentation and discrimination(those similarly situated) in the selection process....to do so risks an adverse judgment.

It is difficult to ascertain the circuit court's standard under Varity because it gave none by its silence but its overall discussion of business discretion and its supremacy over fiduciary duty suggests an unfettered discretion standard.

> "It is lawful to adopt a plan that gives discretion to senior managers, it must be lawful to use that discretion to evaluate what the "best interests of the firm are."(see Appdx.5, infra)

What may seem to be a business decision, even a benevolent business decision, by the court of appeals(see Appdx.5-6,infra), allowing some with a health problem to obtain a Window with embedded health care...ignores GM's fiduciary duty to the Petitioners. Why should ERISA sanction misrepresentation and secrecy about such corporate benevolence and by such misrepresentation deny benefits to those others similarly situated?

The Petitioners never argued(as suggested see Appdx.5,infra) against Lockheed Corp. v. Spink, 517 U.S. 882 (1996) The opinion below postulates an "apparitious" straw man. Petitioners argued that discretion was abusively exercised in a whimsical manner coupled with mendacity. Varity sets the standard for the Petitioners' individual claims not Spink. Petitioners never argued that GM was prohibited from elimination,

change, or amendment of the Window.

Allison's whimsical selections were an undisclosed amendment to the early retirement Window....was the only amendment argument made by the Petitioners and was made in anticipation of a GM argument(that never appeared)...that the plan was amended "on site" by a discretionary selection policy.

Petitioners respectfully suggest that the 9th Circuit's view of Varity in Farr v. U.S. West Communications, Inc., 151 F.3d 908, 911, 912 (9th Cir.1998) is the appropriate standard for an individual's claim for breach of the duty that is....a statement of "the common law duty of loyalty, which requires fiduciaries to deal fairly and honestly with beneficiaries" by providing thorough and accurate information.

CONCLUSION

The petition for a writ of certiorari should be granted so that the Court of Appeals for the Seventh Circuit may understand and apply this Court's precedent in Varity.

Respectfully submitted,

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March 21, 1999

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APPENDIX

Court of Appeals' Opinion 1

District Court's Published Opinion.....7

ALBERT C. MCNAB, ET AL.,
Plaintiffs-Appellants,

GENERAL MOTORS CORPORATION, Defendant-Appellee.

No. 98-1041.

United States Court of Appeals,
Seventh Circuit.
Argued Sept. 11, 1998.
Decided Dec. 11, 1998.

Before POSNER, Chief Judge, and BAUER and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

**1 Like many other firms, General Motors Corporation uses early-retirement programs to reduce its workforce without resorting to involuntary separation. One problem with early-retirement systems, however, is that the best employees may leap at the opportunity, knowing that they can add income from other jobs to their retirement packages; the firm wants to keep these superior employees while shedding those who are not up to snuff, but the sub-par workers are less willing to go, because they may value sinecures and do not expect to find comparable employment elsewhere. If the firm augments the early-retirement incentive to make it attractive to employees who lack prospects of finding other jobs, then the best employees have even more reason to take the offer. To overcome this problem of adverse selection, firms may limit early-retirement programs to employees chosen by management. Managers offer the package to the weakest

members of the staff, simultaneously cutting their unit's budget and improving the average quality of its workers. But good workers may take exclusion poorly; why, they may ask, should rewards vary inversely with quality? Resentment may lead to litigation. In this case 13 employees at the Allison Gas Turbine division of General Motors, told that they were too valuable to let go, contend that the Employee Retirement Income Security Act (ERISA) forbids GM to implement an early-retirement system that leaves participation to the discretion of managers. Although they do not say that discretion is always forbidden, they do contend that it must be exercised so that every similar case company-wide is treated identically. Because this is impossible at any large company, their position is functionally equivalent to an argument that ERISA forbids discretionary early-retirement programs.

In January 1992 GM adopted what it called the "1992 Corporate Window Retirement Program" under which the early-retirement age was decreased from 55 to 53, and the retirement package was sweetened by computing benefits without reduction for the earlier age of retirement or earnings at other jobs. Later in 1992 GM dropped the minimum age from 53 to 50. Early retirement was particularly attractive to employees at the Allison Gas Turbine division, which GM was trying to sell. Some employees were uncertain about their future and perceived early retirement as a source of guaranteed income; others saw it as a means to increase their income, for they could "retire" from GM and draw a pension while remaining employed full time at the newly constituted Allison Engine Company (which was spun off as an independent firm late in 1993). But under the 1992 program early retirement was possible only if GM and the employee agreed, and GM reserved the right to choose according to "GM's best interest". Plant personnel directors sent lists of candidates to the Management Committee of GM's board, which made the final decision.

None of our plaintiffs was selected by Allison's management, which wanted to keep its best workers in order to facilitate the impending sale. Appeals to the Management Committee were unsuccessful. For example, plaintiff Michael Asher related that he was told "that the best employees were being kept because any prospective buyer of the Company needed an experienced workforce. Three times during the meeting, Dr. Wallace told me that I was 'invaluable to the Company.' I was considered to be 'a long term fit in the organization' and not considered to be 'excess to the needs of the organization.' " Plaintiff Nicholas Schmutte was not recommended because managers had been "told that any positions vacated by the incentive separation were not to be replaced. At the time the Contracts Department [in which Schmutte worked] was unable to meet all of the demands with the people on board, let alone with one [fewer]." The district court concluded that none of GM's choices could be called "arbitrary and capricious," the right standard for judicial review of an operational decision under a plan that expressly gives the administrator discretion. 987 F.Supp. 1115 (S.D.Ind.1997). See *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 278-79 (7th Cir.1994); *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir.1985).

**2 [1] Plaintiffs do not contend that GM's stated reasons were mistaken, let alone arbitrary and capricious. They do not argue that the Contracts Department was overstaffed or that they were "excess to the needs of" GM--that any reasonable decisionmaker at GM would have been bound to consider them deadwood. Instead they maintain that decisions under the programs were not strictly according to inverse rankings of performance. One employee was given early retirement to avoid a threat of litigation; another was allowed to retire so that he could stay home with his ill wife; another because he had hypertension; another was a manager so senior that he could put

his own name on the list; still others were (as plaintiffs see things) as valuable to GM as plaintiffs themselves. Plaintiffs' reply brief sums up their position: managers "deviate[d] from the ... Plan's stated purpose [and] made selection decisions based upon cronyism, whimsy and personal notions of honor, duty and fairness. They also reversed nonselection decisions ... for hidden and undisclosed reasons e.g. threats of litigation, complaints of discrimination, cronyism, complaints of health problems."

[2] [3] It is more than a little difficult to see why plaintiffs, whose applications were correctly denied under the program's stated criteria, should be entitled to relief because GM was unduly generous with other employees. If this were a medical benefits program, would one decision to pay for an un-covered medical procedure (say, a dental implant in lieu of a bridge) entitle every other employee to reimbursement for that procedure? An employer is supposed to apply the plan's written terms, and departure from those terms on one occasion does not estop the employer to enforce them on others. See *Frahm v. Equitable Life Assurance Society*, 137 F.3d 955 (7th Cir.1998). Plaintiffs suggest that every divergence from a plan's criteria is an "amendment" of the plan entitling them to the same benefits, but that is a non-starter, rejected in *Frahm*. Amendments are accomplished through a formal process and produce a revised written instrument. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995). Deviations from a plan are just that--deviations. The plan remains what it was, and claims for benefits continue to be evaluated in light of its written criteria.

But plaintiffs' position has a deeper problem. There's nothing wrong under ERISA with a system that gives plan administrators discretion. Subject to a few explicit rules in the statute, an employer may design a pension or welfare plan with features of its choosing, provided it is willing to pay the cost. *Lockheed*

Corp. v. Spink, 517 U.S. 882, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir.1994); *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665 (7th Cir.1993). See also *Henn v. National Geographic Society*, 819 F.2d 824 (7th Cir.1987) (no problem under age discrimination laws either, provided early retirement is voluntary). Plaintiffs concede that GM is entitled to adopt an early-retirement plan under which the eligibility standard is the best interests of GM, as GM's board of directors sees those interests. This is exactly what GM did, having put up the extra money necessary to pay for the benefits. If it is lawful to adopt a plan that gives discretion to senior managers, it must be lawful to *use* that discretion to evaluate what the "best interests" of a firm are. Managers may conclude that it is in the best interest of a firm to allow employees to assist stricken family members or retire early when in ill health; benevolent employment policies make it easier for the firm to attract good workers, and to keep them at lower salaries than Simon Legree Mfg., Inc., must pay. Managers may conclude that it is cheaper (and hence in the best interest of the firm) to let a given worker retire early than to underwrite the costs of defending a lawsuit, for even weak suits may require steep attorneys' fees to achieve victory. (This suit is a good example of that fact.) Because GM is such a large corporation, different managers at different plants (even different managers at the same plant) are bound to interpret the "best interests" of the firm differently. That is the inevitable result of choosing a *standard* (such as "best interests of the firm") rather than a *rule* (such as "in the bottom 20% according to last year's performance evaluations"). Flexibility is doubtless the reason GM adopted a standard rather than a rule; flexible administration therefore cannot be the program's undoing, or we have simply used an under-the-table method to make discretion unlawful, contradicting the conclusion that ERISA permits discretionary plans.

**3. Discretion might be curtailed and the results made more consistent by having a single decisionmaker. But that's not feasible for a large organization such as GM and at any event would not eliminate plaintiffs' beef. What might appear to GM's early-retirement czar as compassion (the health cases) or thrift (the litigation-settlement cases) might appear to plaintiffs as "cronyism"--for they might not be privy to the factors that influenced the decision or might weigh them differently from the plan administrator. "Cronyism" is just an epithet plaintiffs attach to decisions they do not understand or approve. Using a district judge as arbitrator of such disputes would compromise the discretionary nature of the program or appoint the judge as the plan's real early-retirement czar. ERISA does not require the former and does not permit the latter. No surprise, then, that courts have invariably rejected challenges to discretionary decisions made under earlier versions of GM's early-retirement plan, *Bair v. General Motors Corp.*, 895 F.2d 1094 (6th Cir.1990); *Valz v. General Motors Corp.*, No. 88-1794, 1988 WL 150794 (8th Cir. Dec.22, 1988) (unpublished order); *Friesen v. General Motors Corp.*, 759 F.Supp. 560 (E.D.Mo.1991); *Jewell v. Chevrolet Motors Division of General Motors Corp.*, Civ. No. 90-0689-B(CM) (S.D.Cal. Feb. 11, 1991), as well as under comparable plans at other firms. E.g., *Averhart v. U.S. WEST Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir.1994); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918-19 (3d Cir.1990); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283-84 (3d Cir.1988). Our decision in *Fletcher v. Kroger Co.*, 942 F.2d 1137 (7th Cir.1991), is in the same vein. Plaintiffs' protest to the 1992-93 edition of GM's plan meets the same fate.

A F F I R M E D .

Albert C. McNAB, Barry L. Chapman, Michael D. Asher, Wilford Boyland, James Cugier, Luther Fowler, Linda J. Goers, James W. Harris, Frederick R. Hales, Gary L. Marshall, Carl R. Schmid, James P. Vojir, Nicholas G. Schmutte, Paul E. Nordmeyer, Plaintiffs,

v.

GENERAL MOTORS CORPORATION, Finance Committee of the Board of Directors of General Motors Corporation, Defendants.

No. IP 94-1560 C B/S.
United States District Court,
S.D. Indiana
Indianapolis Division.

Dec. 5, 1997.

ENTRY GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BARKER, Chief Judge.

This matter comes before the Court on Defendants' Motion for Summary Judgment on Plaintiffs' Employee Retirement Income Security Act of 1974 ("ERISA") claims that Defendants (1) arbitrarily and capriciously denied Plaintiffs early retirement benefits, (2) breached their fiduciary duty by failing to notify Plaintiffs of amendments to the early retirement plan, and (3) engaged in unlawful discrimination by denying Plaintiffs participation in the early retirement plan. For the reasons explained below, Defendants' Motion for Summary Judgment is

GRANTED on all three claims.

FACTS

This case stems from events surrounding the sale of General Motors' Allison Gas Turbine Division ("AGT") in Indianapolis, Indiana. Plaintiffs were former salaried employees of General Motors ("GM") at AGT, but lost their status as GM employees as a result of the sale. Mowers Aff. ¶ 3. Although Plaintiffs normally could have attempted to transfer to stay within the company, AGT employees were prohibited from transferring once the plant had been identified as a division to be sold. *Id.* at ¶ 40. The sale was effective December 1, 1993, after which time the plant continued business as the Allison Engine Company ("AEC"), and Plaintiffs became employees of AEC. *Id.* at ¶ 4.

During Plaintiffs' employment with GM, the corporation had a standard retirement program for its salaried employees known as the GM Retirement Program. *Id.* at ¶ 5. Under the program, employees were eligible to commence retirement with the immediate payment of monthly benefits if they separated from service upon attainment of age 55 with completion of ten (10) or more years of credited service, at any age after the completion of thirty (30) years of credited service, or upon attainment of age 65. *Id.* at ¶ 6. In addition, on January 15, 1992, GM adopted the 1992 Corporate Window Program for Salaried Employees ("Window One") in an attempt to reduce GM's salaried work force without involuntary separations and layoffs. *Id.* at ¶ ¶ 10, 11. Under Window One, eligible employees age 53, or those who would be age 53 by December 31, 1993, could receive retirement benefits without actuarial reduction for age or reduction for post-retirement earnings. *Id.* at 12.

Not every GM salaried employee who met the requisite age and service requirements was allowed to participate in Window One. *Id.* at ¶ 13. GM management could offer participation to selected salaried employees, or alternatively, salaried employees could approach management to express an interest in participating. *Id.* However, participation always had to be approved by the GM Management Committee, with the critical inquiry being "whether or not it is in GM's best interest to place an employe's [sic] name on the candidate list for a window retirement." *Id.* AGT management was advised to submit candidates for Window One participation to the GM Management Committee on or before March 11, 1992, after which the Committee reviewed the candidates submitted and made the final decision regarding participation. *Id.* at ¶ 15.

On November 2, 1992, GM implemented another version of Window One, labeled the Supplemental Window Salaried Separation Program ("Window Two"). *Id.* at ¶ 17. Its terms were the same as Windows One except that eligibility was extended to employees who would reach age 50 by December 31, 1992. *Id.* at ¶ 18. Under Window Two, management was called upon to submit candidates to the Management Committee for review by November 19, 1992. *Id.* at ¶ 22.

Each of the Plaintiffs met the age and service requirements of Window One and Window Two (hereinafter collectively know as "Windows"), but AGT management refused to recommend their participation. (FN1) *Id.* ***1120** at ¶ 24. Appealing to upper-management, ten of the fourteen Plaintiffs submitted letters to G.A. Knechtel, Vice-President of GM, acknowledging that management's stated reasons for refusing to allow them to participate in Windows were that Plaintiffs were too valuable to GM. (FN2) *Id.* at ¶ 25; Defendants' Exhibit C.

David Mowers, GM Director of Policy Development and Employee Relations, reviewed the claims of each of the ten

Plaintiffs. *Id.* at ¶ 26. Mowers requested and received from each of their managers an explanation of the reasons for not recommending Plaintiffs. *Id.* Each manager noted that the decision not to recommend rested on what was best for the company and, in most cases, the manager determined that the employee was very valuable to the company. Exhibit D of Mower's Affidavit. Mowers told Plaintiffs that the best interests standard was used to determine whether an employee was allowed to participate in Windows and, based on that standard, Plaintiffs were properly denied participation. Exhibit E of Mower's Affidavit.

The GM Management Committee had delegated authority to the Employee Benefits Plans Committee ("EBPC"), whose decision was to be the final step in appealing management's recommendation to deny an employee Windows participation. Mowers Aff. ¶ 32; Defendants' Exhibits G, H. EBPC's review of Plaintiffs' claims resulted in an affirmance of management's recommendation to deny Plaintiffs' Windows participation. Mowers Aff. ¶ 34. In coming to its conclusion, EBPC relied, in part, on a management report containing management's reasons for not recommending Plaintiffs' participation in Windows, including the statement that "[t]he primary reason given to [Plaintiffs] was they were needed to continue the operation, pending sale of the unit to another company." Exhibit I of Mower's Affidavit. Having exhausted their administrative appeals, Plaintiffs commenced this action on October 24, 1994.

SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.Pro. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party on the particular issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Methodist Med. Ctr. v. American Med. Sec. Inc.*, 38 F.3d 316, 319 (7th Cir.1994).

In resolving a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movants. *Patel v. Allstate Ins. Co.*, 105 F.3d 365, 366 (7th Cir.1997); *Spraying Sys. Co. v. Delavan, Inc.*, 975 F.2d 387, 392 (7th Cir.1992). However, we must not "ignore facts in the record merely because they are unfavorable.... [A non-movant] gets the benefit of the doubt only if the record contains competent evidence on both sides of a factual question." *Patel*, 105 F.3d at 366. Thus, if genuine doubts remain, and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992); *Wolf v. City of Fitchburg*, 870 F.2d 1327, 1330 (7th Cir.1989).

DISCUSSION

Plaintiffs assert three claims, all arising under ERISA: that Defendants (1) arbitrarily denied Plaintiffs participation in Windows, (2) breached their fiduciary duty by failing to notify Plaintiffs of amendments to Windows, and (3) engaged in unlawful discrimination by denying Plaintiffs participation in Windows.

I) DENIAL OF BENEFITS CLAIM

[1] Plaintiffs allege that they were entitled to participate in Windows, but that Defendants arbitrarily refused to allow them to participate. Plaintiffs attempt to rely on Section 510 of ERISA in support of their denial of benefits claim. *See* Plaintiffs' Response *1121 to Defendants' Motion for Summary Judgment at 28. However, "[s]ection 510 applies only in instances in which an employer wrongfully alters the employment relationship to prevent benefit rights from vesting." *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir.1996). Section 502(a)(1)(B) provides a remedy to an employee entitled to benefits under a plan but does not receive them for any reason, malicious or not. *See Teumer v. General Motors Corp.*, 34 F.3d 542, 545 (7th Cir.1994). To the extent that Plaintiffs allege a non-malicious denial of benefits, their claim arises under Section 502(a)(1)(B), not Section 510. *See id.*

[2] Both parties agree that the EBPC has discretionary power to interpret and apply Windows and that the EBPC's decision to deny Plaintiffs participation in Windows should be reviewed under the arbitrary and capricious standard. *See* Defendants' Motion for Summary Judgment at 19; Plaintiffs' Response at 27. Indeed, the Court must apply the arbitrary and capricious standard when reviewing a plan administrator's decision on a plan, such as Windows, where discretion has been vested in that administrator. *See Dade v. Sherwin-Williams Co.*, 128 F.3d 1135 (7th Cir.1997). This standard does not require the EBPC's decision to be the only sensible application of the plan, so long as its decision "offers a reasoned explanation, based on the evidence, for a particular outcome." *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 278 (7th Cir.1994) *quoting Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir.1985).

[3] [4] "Uniform interpretation and application of plan rules are important factors in deciding whether a denial of benefits is

arbitrary and capricious." *Russo v. Health, Welfare & Pension Fund, Local 705, International Brotherhood of Teamsters*, 984 F.2d 762, 766 (7th Cir.1993); *see also Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 279 (7th Cir.1994). To prove that Windows lacked uniform application, Plaintiffs must establish that employees similarly-situated to them were treated differently under the plan. *See Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir.1990); *Lewis v. Pneumo Abex Corp.*, No. 93-C-3536, 1994 WL 178457 (N.D.Ill. May 9, 1994). Courts have been reluctant to hold that employees were similarly-situated unless the employees were in "materially indistinguishable" circumstances. *Id.; see Morse v. Stanley*, 732 F.2d 1139, 1144 (2nd Cir.1984); *Spencer v. Central States, Southeast and Southwest Areas Pension Fund*, 778 F.Supp. 985, 996-97 (N.D.Ill.1991).

Plaintiffs contend that Defendants did not apply Windows uniformly, resulting in an arbitrary and capricious denial of benefits to Plaintiffs. Defendants rejoin that its eligibility determinations were uniformly governed by what was in the "best interests of management" and that denying Windows participation to valuable employees, like Plaintiffs, was in management's best interests because it allowed the plant to be sold as an ongoing concern with an intact, viable work force.

[5] As a threshold matter, Defendants move to strike documents not presented to the EBPC when it decided Plaintiffs' administrative appeal, contending that the Court must consider only evidence presented to the plan administrator. Plaintiffs respond that the evidence which Defendants seek to strike is relevant and admissible to the extent that it goes to the uniformity of Windows' application.

Determining the uniformity of Windows' application is plainly relevant to whether Plaintiffs were denied participation arbitrarily and capriciously. *See Russo*, 984 F.2d at 766.

Recognizing the relevancy of a plan's uniform application, courts have consistently admitted such evidence regardless of whether it was considered by the plan administrator. *See Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir.1990); *Sly v. P.R. Mallory & Co.Inc.*, 712 F.2d 1209, 1213 (7th Cir.1983). Accordingly, Defendants' Motion to Strike Certain of Plaintiffs' Exhibits Contained in Appendix 2 is DENIED.

Plaintiffs present, in rather ad hoc fashion, evidence purporting to demonstrate a lack of uniformity in Defendants' application of Windows. The evidence consists of examples of alleged inconsistent applications of Windows and can be grouped in two categories: (1) examples of valuable employees allowed to participate in Windows, and (2) examples of managers who used age-related criteria or no criteria at all when recommending Windows participants.

*1122 [6] The first category includes evidence of AGT executives who participated in Windows despite being clearly valuable to GM. Plaintiffs maintain that their retirements were not in the best interests of management and that their treatment was inconsistent with that afforded other valuable employees, like Plaintiffs. Defendants rejoin that these executives were not similarly-situated to Plaintiffs and that their participation in Windows was indeed in the company's best interests. Specifically, GM wanted the non-plaintiff executives to be part of a transition team so that plant operations would continue to run smoothly as the plant was transferred to AEC ownership. To ensure that the executives would not be lured away by competitors, Defendants offered to allow them to retire under Windows so long as they would continue to work as consultants on the transition team. The executives accepted that proposal, retired, but continued to work as part of the transition team, thus allowing plant operations to continue during the course of the sale. Defendants did not believe that providing the same

arrangements to lower-level employees would be necessary to retain them and, consequently, certain valuable lower-level employees, like Plaintiffs, were not allowed to participate in Windows.

Allowing the executives to participate in Windows "does not mean that [Defendants] donned a discretionary strait-jacket which held them bound to grant [participation] in all cases as a matter of course. On the contrary, the Plan gave them broad discretion to evaluate requests for [participation in Windows] on a case by case basis." *Morse v. Stanley*, 732 F.2d at 1144. The EBPC's decisions, so long as they were not arbitrary and capricious, were otherwise within their discretion. *See Morton v. Smith*, 91 F.3d 867, 870 (7th Cir.1996). The executives and Plaintiffs were clearly in "materially distinguishable" circumstances, and Defendants had to make determinations in light of those differences. Defendants' decision to allow the executives to retire under Windows, while denying participation to Plaintiffs, was based on a permissible assessment of the company's best interests and does not establish that Plaintiffs' denials were arbitrary and capricious.

[7] Plaintiffs also present evidence of non-executive AGT employees who retired under Windows and who then were hired by AEC after the sale. Plaintiffs contend that AEC's hiring of these employees indicates that they were allowed to participate in Windows despite being valuable to GM.

Plaintiffs' assumption that employees hired by AEC after the sale were also valuable to GM at the time Windows participation was determined is not necessarily valid. Although GM sold the plant as an ongoing concern, it was not sold with a full work force. Indeed, it was not in GM's interests to retain full employment at the plant; it simply needed to provide AEC with a viable work force. That AEC hired some Windows retirees does not illustrate that those employees were allowed

Windows retirement despite being valuable to GM. These employees reasonably could have been determined not to be valuable to GM at the time of Windows, but were hired later by AEC simply to fill out its employment force. This conclusion is supported by the fact that AEC hired back most of these employees in a different capacity than what they held when they worked for GM, some even returning as temporary workers or consultants, suggesting that retention of these employees in their original positions would likely have been unnecessary in providing AEC with a viable work force.

[8] Assuming *arguendo* that it was in GM's interest not to have allowed these employees to participate in Windows, Plaintiffs still fail to establish that the best interests standard was not applied uniformly when evaluating these employees. Although over time GM's assessments may have proven to be unwise or inaccurate, that outcome does not establish that the decisions were not based on a proper application of the best interests standard. The bottom line is that Plaintiffs have failed to produce evidence that Windows participation decisions were made on a basis other than the best interests standard. Indeed, the accuracy of the assessments is wholly irrelevant to Plaintiffs' case so long as the best interests standard was applied uniformly.

[9] The second category of Plaintiffs' evidence includes allegations that some AGT *1123 managers used age-related criteria or no criteria at all in recommending employees for Windows. Specifically, Plaintiffs allege that S. Michael Hudson ("Hudson"), then-Director of Engineering at AGT, recommended participation in Windows for anyone in his department who wanted it, without regard to the best interests standard. Plaintiffs, however, fail to support this assertion with any specific citation to the record and, as is well-known, a bald, conclusory assertion is insufficient to withstand summary

judgment. *See Northern Assurance Co. of America v. Summers*, 17 F.3d 956, 961 (7th Cir.1994). Furthermore, assuming Hudson's decisions were in fact flawed in this fashion,

Plaintiffs fail to demonstrate that the best interests standard was not used by the EBPC in making its final decisions regarding Hudson's recommendations.

[10] [11] Plaintiffs next allege that Calvin Emmerson ("Emmerson"), then-Chief Engineer of Test and Controls at AGT, recommended employees for Windows on the basis of age and seniority, without regard to the best interests standard. A minimum number of employees in most departments had to be retained in order to provide AEC with a viable work force and Emmerson's department was no exception. Accordingly, the best interests of GM required that Emmerson not recommend participation in Windows by all those in his department who were qualified. Recognizing this, Emmerson used age and seniority to decide who to recommend among those qualified. There is no evidence that this criteria was not objectively and uniformly applied by Emmerson to his department or that his method was unreasonable. Plaintiffs clearly fail to demonstrate how Emmerson's recommendations were inconsistent with the best interests standard. (FN3) Furthermore, none of Plaintiffs were even in Emmerson's department.

[12] Windows was implemented to provide an incentive for some salaried workers to retire early. It was not intended to be made available to *any* salaried employee who met the age and service requirements. Accordingly, the plan gave discretion to the EBPC to allow participation only in situations where it would be in the best interests of management. The evidence establishes that this principle was uniformly applied to Defendants' participation decisions and guided the decisions to deny Plaintiffs' participation in Windows. Accordingly, Defendants' Motion for Summary Judgment on Plaintiffs' denial

of benefits claim is GRANTED.

II) BREACH OF FIDUCIARY DUTY CLAIM

[13] [14] Plaintiffs also contend that Defendants breached their fiduciary duty by failing to notify Plaintiffs of amendments to Windows. Defendants respond that amending Windows was a matter of plan design, not subject to review under fiduciary standards. (FN4)

*1124 [15] "A plan fiduciary may violate its duties ... either by affirmatively misleading plan participants about the operations of a plan, or by remaining silent in circumstances where silence could be considered misleading." *Schmidt v. Sheet Metal Workers' National Pension Fund,* 128 F.3d 541, (7th Cir.1997); *see also Varity Corp. v. Howe,* 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Plaintiffs in the instant case allege that Defendants breached their fiduciary duty by failing to notify Plaintiffs that the stated Windows deadline could be extended and that all valuable employees were not denied participation.

Plaintiffs do not dispute that copies of the Windows plan were distributed or that the plan provided for specific sign-up deadlines. Instead, they allege that the written deadlines were modified by Defendants' failure to enforce the deadline absolutely and that Defendants then breached their fiduciary duty by not informing Plaintiffs of that modification. Plaintiffs' evidence consists of their assertion that Robert Hunter, an employee at AGT, was allowed to sign-up for Windows after the deadline. Plaintiffs fail to muster any evidence in support of this assertion (no affidavit, no deposition testimony, etc.) and, as previously discussed, bald assertions are insufficient to withstand a motion for summary judgment. *See Northern Assurance Co. of America v. Summers,* 17 F.3d at 961.

Again, assuming *arguendo* that Plaintiffs had substantiated this assertion, the allowance of one late sign-up after the written deadline does not constitute a modification of the plan. Courts are reluctant to find modifications of written ERISA-governed plans, and we find no reason here for an exception. *See Doe v. Blue Cross & Blue Shield United of Wisconsin,* 112 F.3d 869, 876 (7th Cir.1997). A single extension of the deadline for a single employee clearly is not behavior which constitutes a modification of a written early retirement plan covering thousands of employees. Accordingly, we hold that the Windows' deadline was not modified and Defendants did not breach their fiduciary duty.

[16] Plaintiffs also claim that Windows was amended when Defendants permitted some valuable employees to participate and that Defendants then breached their fiduciary duty by failing to notify Plaintiffs of that amendment. This argument simply re-states Plaintiffs' denial of benefits claim. Plaintiffs fail to demonstrate that allowing some valuable employees to participate in Windows is inconsistent with or amends the plan's terms. In fact, as previously discussed in Plaintiffs' denial of benefits claim, allowing some valuable employees to participate in Windows was deemed to be in the best interests of GM and therefore was faithful to the terms of the plan. Clearly, allowing valuable employees to participate in Windows did not modify or amend the plan. Accordingly, we conclude that Defendants did not breach their fiduciary duty and Defendants' Motion for Summary Judgment on Plaintiffs' breach of fiduciary duty claim is GRANTED.

III) DISCRIMINATION CLAIM

[17] Plaintiffs' final claim is that Defendants engaged in unlawful discrimination, in violation of Section 510 of ERISA,

by denying Windows participation to Plaintiffs. Defendants maintain that they had no discriminatory intent when they denied Plaintiffs Windows participation and that Plaintiffs' discrimination claim does not arise out of an adverse employment action. Plaintiffs fail to dispute Defendants' contentions in this respect in their Response to Defendants' Motion for Summary Judgment.

Section 510 of ERISA provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan..

*1125 29 U.S.C. § 1140. "Section 510 applies only in instances in which an employer wrongfully alters the employment relationship to prevent benefit rights from vesting." *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir.1996). In their Response to Defendants' Motion for Summary Judgment, Plaintiffs fail to make any distinction between their denial of benefits claim and their discrimination claim and never allege that Defendants wrongfully altered their employment relationship to prevent benefit rights from vesting. Rather, Plaintiffs simply allege that the denial of benefits constituted unlawful discrimination, without anything more. This deficiency is fatal to Plaintiffs' discrimination claim; any wrongful denial of benefits, even if made in bad faith, did not affect Plaintiffs' employment status and therefore does not form a basis for a § 510 violation. *See Teumer v. General Motors Corp.*, 34 F.3d 542, 545 (7th Cir.1994).

The only adverse employment action that Plaintiffs note is GM's decision to prohibit AGT employees from transferring within GM once the plant had been identified as a division to be sold. However, Plaintiffs never allege that the prohibition

constituted unlawful discrimination. Instead, the prohibition was merely stated as background information in their Complaint and Response to Defendants' Motion for Summary Judgment.

[18] [19] [20] [21] [22] Even if Plaintiffs had alleged that the transfer prohibition constituted unlawful discrimination, the discrimination claim would fail. To recover under Section 510, Plaintiffs must show that the employer wrongfully altered the employment relationship with the specific intent to interfere with their ERISA rights. *See Teumer,* 34 F.3d at 550. Plaintiffs may satisfy this burden either by presenting direct evidence of interference with their protected benefits or by utilizing the burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Salus v. GTE Directories Service Corp.*, 104 F.3d 131, 135 (7th Cir.1997); *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir.1996). Plaintiffs here must rely on the burden-shifting approach because no direct evidence has been presented. Thus, Plaintiffs must establish a prima facie case of interference by demonstrating that they (1) belong to the protected class; (2) were qualified for their jobs; and (3) suffered an adverse employment decision under circumstances that provide some basis for believing that the prohibited intent to interfere was present. *Id.* Once Plaintiffs establish a prima facie case of interference, the burden shifts to Defendants to offer a legitimate, non-discriminatory reason for the challenged employment action. *Id.* If Defendants present a legitimate reason, the burden shifts back to Plaintiffs to demonstrate that the proffered explanation is pretext and that the motivating factor behind the adverse employment action was the specific intent to interfere with Plaintiffs' ERISA rights. *Meredith v. Navistar Int'l Transp. Co.*, 935 F.2d 124, 127 (7th Cir.1991); *see also Salus,* 104 F.3d at 135.

Defendants state that they prohibited transferring in an

effort to retain a viable workforce for AEC. This is a legitimate, non-discriminatory reason, the effect of which shifts the burden to Plaintiffs to show pretext. To survive summary judgment, Plaintiffs were required to produce evidence sufficient to create an issue of fact as to whether Defendants' proffered non-discriminatory reasons are pretext. *See Grottkau,* 79 F.3d at 73. Plaintiffs, however, fail to show pretext, offering instead isolated examples of employees permitted to transfer (with rare citations to the record, by the way). At best, such evidence demonstrates that while some employees apparently circumvented the prohibition, Defendants' proffered reason for the transfer prohibition was nonetheless valid. Accordingly, Defendants stated purpose for restricting transfer, to wit, that it wanted to be able to sell AGT as an ongoing concern and provide AEC with a viable work force, suffices to defeat Plaintiffs' claim. Therefore, Defendants' Motion for Summary Judgment on Plaintiffs' discrimination claim is GRANTED.

CONCLUSION

We have held that Defendants' Motion to Strike evidence not considered by the plan administrator must be DENIED, but Defendants' Motion for Summary Judgment on Plaintiffs' denial of benefits claim must be GRANTED because Defendants' decision not to allow Plaintiffs to participate in Windows was not arbitrary and capricious. Defendants' ***1126.** Motion for Summary Judgment on Plaintiffs' breach of fiduciary duty claim must also be GRANTED because Defendants did not have a duty to inform Plaintiffs that the Windows deadline could be extended or that some valuable employees could participate in Windows. Finally, Defendants' Motion for Summary Judgment on Plaintiffs' discrimination claim must be GRANTED because Plaintiffs failed to allege a wrongful alteration of their

employment relationship and failed to establish that Defendants' legitimate, non-discriminatory reason for prohibiting transfer was pretext.

FN1. Both parties acknowledge that Plaintiff James Cugier is no longer part of this case and that he participated in Windows.

FN2. The ten Plaintiffs included Michael Asher, Wilford B. Boyland, Luther C. Fowler, Linda J. Goers, Frederick R. Hale, James W. Harris, Albert C. McNab, Gary Marshall, Carl R. Schmid, and Nicholas G. Schmutte. Defendants' Exhibit C.

FN3. Plaintiffs also cite as evidence of arbitrariness in Windows' application the fact that Defendants inadvertently refused to allow James Cugier to participate in Windows and that it was not until Defendants' error was uncovered in the course of this case's discovery that he was permitted to participate. Defendants concede as much, but maintain that the error does not demonstrate that the system was implemented in an arbitrary manner. Windows involved thousands of employees and endless paperwork and occasional human error was almost inevitable. Clearly, the fact that one employee was not initially permitted to participate in Windows despite being approved to do so, does not demonstrate that Windows was applied arbitrarily as a whole or as to Plaintiffs.

FN4. Plaintiffs move to strike the portion of Defendants' Reply Brief pertaining to Plaintiffs' breach of fiduciary duty claim, alleging that Defendants failed to raise the fiduciary duty claim in its original motion for summary judgment and brief in support thereof. However, Defendants' Memorandum in Support of Summary Judgment did address the fiduciary duty issue at pages 1, 2, 20, and 25. Accordingly, Plaintiffs' motion is DENIED and Plaintiffs' request to file an additional brief addressing fiduciary duty is also DENIED.

Plaintiffs also move to strike Defendants' Summary

Judgment Reply Brief for exceeding the 20-page limit for reply briefs. *See* Local Rule 7.1(b). Plaintiffs acknowledge that Defendants' consolidated brief, containing their Reply Brief and Memorandum in Support of its Motion to Strike, is permitted to total 55-pages; 20-pages for the Reply Brief and 35-pages for the Memorandum in Support of its Motion to Strike. Plaintiffs correctly point out, however, that Defendants used approximately 25-pages for its Reply Brief, violating the 20-page limit. The Court has the discretion to strike the excess pages but, in this case, such a result would be unjust. Defendants were replying to Plaintiffs' Response Brief, which included mis-numbered and upside down pages, rare citations to evidence, and innumerable grammatical and spelling errors. To adequately respond to such a brief, Defendants used additional pages simply to organize and clarify the issues. Although the Court does not condone exceeding page limitations, in this case, the Court opts not to strike the excess pages. Therefore, Plaintiffs' motion to strike is DENIED. Indeed, even if we struck the excess pages, this entry and our holdings would remain unchanged.